PUBLICATION INFORMATION:

Asa-Brandt, Inc. v. Farmers Co-Operative Society, 2002 WL 1714197 (N.D. Iowa May 10, 2002) (Unpublished decision)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ASA-BRANDT, INC. a/k/a ASA-BRANDT PARTNERSHIP; PHILLIP ASA; KEITH BRANDT; ROBERT BECKER; DENNIS CINK; DUANE DEWAARD; BEVERLY EVERETT; RICHARD GARDNER; EDWARD A. OTIS; JIM OTIS; RONALD SCHMIDT; and DEBRA SCHMIDT, Plaintiffs, vs. FARMERS CO-OPERATIVE SOCIETY, Defendant.	No. C01-3021-MWB **ORDER REGARDING DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, ALTERNATIVELY, FOR A NEW TRIAL**

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I. PROCEDURAL BACKGROUND

This matter came to trial on June 11, 2001, on plaintiffs' claims of breach of contract and breach of fiduciary duty against defendant Farmers Co-operative Society of Wesley ("Wesley"), and Wesley's counterclaims of breach of contract against each of the plaintiffs. On July 13, 2002, a jury returned a verdict in favor of each of the plaintiffs on their claims of breach-of-contract and breach of fiduciary duty with an award of damages and punitive damages, and against Wesley on its counterclaims of breach of contract.

On August 7, 2001, Wesley filed its Renewed Motion For Judgment As A Matter Of Law Pursuant To Rule 50(b) Or, Alternatively, For A New Trial Pursuant To Rule 59 (#146). In its motion, Wesley requests an order pursuant to Rule 50 of the Federal Rules of Civil Procedure granting it judgment as a matter of law on plaintiffs' breach of contract and breach of fiduciary duty claims on the ground that plaintiffs failed to produce sufficient evidence to support their claims or to support the award of punitive damages. Wesley also requests that the court grant it judgment as a matter of law on its breach of contract claims against plaintiffs. Alternatively, Wesley requests that the court grant it a new trial on all claims. Plaintiffs' filed a timely resistance to Wesley's post-trial motions.

II. LEGAL ANALYSIS

A. Applicable Standards

This court set out the standards applicable to a post-trial motion for judgment as a

matter of law in *Mercer v. City of Cedar Rapids*, 129 F. Supp. 2d 1226 (N.D. Iowa 2001), as follows:

> The standards for a motion for judgment as a matter of law are outlined in Rule 50 of the Federal Rules of Civil Procedure. In pertinent part, Rule 50 provides:
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> **(a) Judgment as a Matter of Law.**
>
> **(1)** If during the trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
>
> **(2)** Motions for judgment as a matter of law may be made at any time before the submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.
>
> **(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.** If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:
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> **(1)** if a verdict was returned:
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> **(A)** allow the judgment to stand,
>
> **(B)** order a new trial, or
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> **(C)** direct entry of judgment as a matter of law; or
>
> **(2)** if no verdict was returned;
>
> **(A)** order a new trial, or

(B) direct entry of judgment as a matter of law. FED R. CIV. P. 50(a)-(b).

The Eighth Circuit Court of Appeals reiterated the standards to be applied by the district court—as well as the appellate court—in determining a motion for judgment as a matter of law:

> When the motion seeks judgment on the ground of insufficiency of the evidence, the question is a legal one. *Hathaway v. Runyon*, 132 F.3d 1214, 1220 (8th Cir. 1997); *Jarvis v. Sauer Sundstrand Co.*, 116 F.3d 321, 324 (8th Cir. 1997). A jury verdict must be affirmed "'unless, viewing the evidence in the light most favorable to the prevailing party, we conclude that a reasonable jury could have not found for that party.'" *Stockmen's Livestock Mkt., Inc. [v. Norwest Bank of Sioux City*], 135 F.3d 1236, 1240-41 (8th Cir. 1998) (quoting *Chicago Title Ins. Co. v. Resolution Trust Corp.*, 53 F.3d 899, 904 (8th Cir. 1995)).

Cross v. Cleaver, 142 F.3d 1059, 1066 (8th Cir. 1998); *accord Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 2109 147 L. Ed. 2d 105 (2000) (stating that under Rule 50, a court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.") (citations omitted). Thus, this standard requires the court to:

> "[C]onsider the evidence in the light most favorable to the prevailing party, assume that the jury resolved all conflicts of evidence in favor of that party, assume as true all facts which the prevailing party's evidence tended to prove, give the prevailing party the benefit of all favorable inferences which may reasonably be drawn from the facts, and deny the motion, if in light of the foregoing, reasonable jurors could differ as to the conclusion that could be drawn from the evidence."

Minneapolis Community Dev. Agency v. Lake Calhoun Assoc., 928 F.2d 299, 301 (8th Cir. 1991) (quoting *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 989 (8th Cir. 1989)); *see*

> *also Stephens v. Johnson*, 83 F.3d 198, 200 (8th Cir. 1996) (citing *Whitnack v. Douglas County*, 16 F.3d 954, 956 (8th Cir. 1994), in turn, quoting *Hasting v. Boston Mut. Life Ins. Co.*, 975 F.2d 506, 509 (8th Cir. 1992)); *Haynes v. Bee-Line Trucking Co.*, 80 F.3d 1235, 1238 (8th Cir. 1996); *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 800 (8th Cir. 1994) (reiterating these factors, citing *White v. Pence*, 961 F.2d 776, 779 (8th Cir. 1992); *McAnally v. Gildersleeve*, 16 F.3d 1493, 1500 (8th Cir. 1994) (same).
>
> This standard for consideration of a motion for judgment as a matter of law accords the jury's verdict substantial deference. *Tilson v. Forrest City Police Dep't*, 28 F.3d 802, 806 (8th Cir. 1994), *cert. denied*, 514 U.S. 1004, 115 S. Ct. 1315, 131 L. Ed. 2d 196 (1995); *McAnally*, 16 F.3d at 1500. However, even with this deference to the jury's verdict, the jury cannot be accorded "the benefit of unreasonable inferences, or those 'at war with the undisputed facts,'" *McAnally*, 16 F.3d at 1500 (quoting *City of Omaha Employees Betterment Ass'n v. City of Omaha*, 883 F.2d 650, 651 (8th Cir. 1989), in turn, quoting *Marcoux v. Van Wyk*, 572 F.2d 651, 653 (8th Cir.), *cert. dismissed*, 439 U.S. 801, 99 S. Ct. 43, 58 L. Ed. 2d 94 (1978)), but the court must still defer to the jury's resolution of conflicting testimony. *Jackson v. Virginia*, 443 U.S. 307, 326, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Mercer, 129 F. Supp. 2d at 1230-32.

The standards cited in *Mercer* appear to be fully in accord with those stated in decisions of the Eighth Circuit Court of Appeals. *See, e.g., Foster v. Time Warner Entertainment Co.*, 250 F.3d 1189, 1194 (8th Cir. 2001) ("Judgment as a matter of law is proper only when there is a complete absence of probative facts to support the conclusion reached so that no reasonable juror could have found for the nonmoving party.") (internal quotation marks and citations omitted); *Children's Broadcasting Corp. v. Walt Disney Co.*, 245 F.3d 1008, 1015 (8th Cir. 2001) ("Judgment as a matter of law [post-trial] is warranted only when all the evidence points in one direction and no reasonable interpretations support

the jury's verdict."); *Tatom v. Georgia-Pacific Corp.*, 228 F.3d 926, 931-32 (8th Cir. 2000) (articulating similar standards, noting that "'[t]his demanding standard reflects our concern that, if misused, judgment as a matter of law can invade the jury's rightful province,'" quoting *Gardner v. Buerger*, 82 F.3d 248, 251 (8th Cir. 1996), and that "[a] jury's verdict should not be lightly set aside, but in this case our duty is to do so"); *Belk v. City of Eldon*, 228 F.3d 872, 877-78 (8th Cir. 2000) (articulating similar standards and noting, *inter alia*, that "[p]ost-verdict judgment as a matter of law is appropriate only where the evidence is entirely insufficient to support the verdict"), *cert. denied*, 121 S. Ct. 1734 (2001). Therefore, the court will apply these standards here.

B. Breach Of Contract Claims

1. Sufficiency of evidence to support damage award

Wesley contends that the jury's award of damages for Wesley's breach of contract is not supported by the evidence introduced at trial. Upon review of the record, the court concludes that sufficient evidence was presented at trial to support the jury's award of damages to plaintiffs for Wesley's breach of contract. Plaintiffs' damages theory was grounded on plaintiffs rolling their flex-hedge contracts to the next year or setting the basis for delivery under the flex-hedge contracts one week prior to the first notice day of the new crop futures contract. Plaintiffs' damages theory was fully supported by expert testimony. Plaintiffs' damages represent the difference in price between what plaintiffs could have sold their grain for under the flex-hedge contracts and what plaintiffs actually sold their grain for on the open market.

2. Judicial estoppel

Wesley further argues that plaintiffs' breach of contract claim is barred by judicial estoppel. "The doctrine of judicial estoppel prohibits a party from taking inconsistent positions in the same or related litigation." *Hossaini v. Western Mo. Med. Ctr.*, 140 F.3d

1140, 1142 (8th Cir. 1998) (citing *Wyldes v. Hundley*, 69 F.3d 247, 251 n. 5 (8th Cir.1995)), *cert. denied*, 517 U.S. 1172 (1996)). The Eighth Circuit Court of Appeals has observed that: "The underlying purpose of the doctrine is 'to protect the integrity of the judicial process.'" *Hossaini*, 140 F.3d at 1142 (quoting *Total Petroleum, Inc. v. Davis*, 822 F.2d 734, 737 n. 6 (8th Cir. 1987); *see also Monterey Dev. Corp. v. Lawyer's Title Ins. Corp.*, 4 F.3d 605, 609 (8th Cir. 1993) (noting judicial estoppel is "designed to preserve the dignity of the courts and insure order in judicial proceedings"). The court concludes that Wesley has failed to preserve its claim of error with respect to its claim of judicial estoppel. Wesley did not proffer a jury instruction on such a claim nor did it object to the jury instructions employed by the court on that ground. Therefore, the court concludes that any error on this ground has been waived.

C. Breach Of Fiduciary Duty Claims

Wesley also assails the jury's determination on plaintiffs' claims of breach of fiduciary duty based on the sufficiency of the evidence. In order to prevail on their individual claims of breach of fiduciary duty, the jury was instructed that each plaintiff had to prove the following four elements by the greater weight of the evidence: (1) Wesley owed a fiduciary duty to that plaintiff; (2) Wesley breached the fiduciary duty it owed to that plaintiff; (3) the breach of fiduciary duty was a proximate cause of damage to that plaintiff; and (4) the amount of damages, if any. *See* Final Jury Instruction No. 7. The court fully instructed the jury with respect to each of these elements.

Evidence was presented to the jury that elevator managers owed a duty of full and fair disclosure to their patrons of the risks in any marketing plan due to their position as professional marketers. The jury also heard evidence that Art Beenken had more experience, expertise, and knowledge of the markets and with spreads. Thus, the jury could have reasonably inferred that Wesley possessed superior knowledge and experience with

grain transactions involving any sort of "hedging" or speculation about the future performance of the grain market. Based on this disparity of business experience between Wesley and plaintiffs and evidence that Wesley invited plaintiffs to seek its advice with respect to the markets and spreads, the jury could have reasonably concluded that a fiduciary duty existed. Therefore, the court concludes that there was sufficient evidence of a fiduciary relationship between the parties to sustain the jury's verdict on each of the plaintiffs' breach of fiduciary duty claims.[1]

Wesley also contends that even if a fiduciary relationship exists that the actions attributable to Wesley did not breach that duty. As this court has previously observed, "It is a breach of fiduciary duty for a fiduciary to fail to perform the duty to disclose all material facts in dealing with the other party to permit the other party to make an intelligent, knowing decision in such dealings." *Top Of Iowa Coop. v. Schewe*, 149 F. Supp. 2d 709, 719 (N.D. Iowa 2001). The court finds that evidence was presented by which a jury could find that Wesley neglected to inform plaintiffs of the following: (1) Wesley's need of a source of funds to maintain the flex-hedge program; (2) Wesley's failure to adopt a set of internal controls that would allow Wesley to adequately monitor the flex-hedge program; (3) Wesley's writing of more flex-hedge programs than Wesley knew could be margined though adverse market conditions; (4) adequate warnings of all the material risks inherent in the flex-hedge program; (5) Wesley's taking the other side of plaintiffs' July 1996 flex-hedge positions; (6) Wesley conspiraced with other cooperatives to make

[1]The court finds that Wesley has failed to preserve error on its assertion that any fiduciary relationship must have ended on June 4, 1996. While Wesley sought and received a jury instruction that precluded the jury from considering acts that occurred after June 4, 1996, when considering plaintiffs' breach of contract claims, no similar instruction was sought regarding plaintiffs' breach of fiduciary duty claims. Wesley also did not object to the court's final jury instructions on this ground.

unreasonable demands on plaintiffs to pay Wesley's margin and deliver grain in an attempt to conceal Wesley's inability to fund the flex-hedge program; and, (7) Wesley's use, as a part of its conspiracy with other cooperatives, of false and misleading comments to turn the community against plaintiffs as a means to force plaintiffs to pay margin money that they did not owe. The court finds that the jury could have reasonably found such actions to constitute a breach of a fiduciary duty Wesley owed plaintiffs. Therefore, Wesley's motion for judgment as a matter of law on plaintiffs' claims of breach of fiduciary duty is denied.

D. Punitive Damages

Wesley next contends that the punitive damages award on plaintiffs' breach of contract claims are not supported by the evidence. Under Iowa law, the decision of whether to award punitive damages and the scope of the damages are within the province of the finder of fact. The evidence to support an award must be clear, convincing and satisfactory. *See* IOWA CODE § 668A.1(1)(a); *accord Revere Transducers Inc. v. Deere & Co.*, 595 N.W.2d 751, 771 (Iowa 1999); *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 142 (Iowa 1996). Conduct that establishes a "willful and wanton disregard for the rights or safety of another" will support an award of punitive damages. *Wilson* , 558 N.W.2d at 142. The Iowa Supreme Court has approved the following definition of "willful and wanton" conduct for section 668A.1(1) purposes:

> [T]he actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.

Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911, 919 (Iowa 1990) (quoting Prosser and Keeton on Torts § 34, at 213 (1984)); accord *Midwest Home Distrib. v. Domco Indus.*, 585 N.W.2d 735, 743 (Iowa 1998).

1. Punitive damages for breach of contract

Wesley contends that the punitive damages award on plaintiffs' breach of contract claims are not supported by the evidence. Wesley asserts that an intentional breach of contract does not warrant the imposition of punitive damages. The Eighth Circuit Court of Appeals, however, has observed that:

> Under Iowa law, punitive damages are appropriate where the conduct constitutes "willful and wanton disregard for the rights or safety of another." Iowa Code Ann. § 668A(1)(a). This case arises from a breach of contract. While an ordinary breach of contract does not give rise to punitive damages in Iowa, if the breach is accompanied by or results in independently tortious actions or fraudulent activity then punitive damages are permissible. *See Pogge v. Fullerton Lumber Co.*, 277 N.W.2d 916, 919-20 (Iowa 1979).

Watkins v. Lundell, 169 F.3d 540, 545 (8th Cir. 1999). Here, the court concludes that evidence was introduced at trial by which the jury could reasonably find that Wesley's breach of contract was accompanied by breaches of its fiduciary duty owed to plaintiffs. Therefore, this portion of Wesley's motion is also denied.

2. Punitive damages for breach of fiduciary duty

The jury's finding that plaintiffs had proven that Wesley acted with willful and wanton disregard for plaintiffs' interests was supported by the evidence. Plaintiffs produced evidence that Wesley took the following actions as part of a deliberate plan to force plaintiffs to get out of flex-hedge contracts: distributing a demand for adequate assurance issued in bad faith which included demands for margin payment; constructing a check list which prevented plaintiffs from cash forwarding their 1996 crop; disseminating information that Wesley knew to be false which resulted in damages to plaintiffs' goodwill in the community. The jury, therefore, was within its discretion to find that Wesley acted with willful and wanton disregard for plaintiffs' interests. Therefore, this portion of Wesley's

motion is also denied.

Wesley further contends that punitive damages awarded in this case were excessive and unconstitutional. The United States Supreme Court addressed the constitutionality of excessive punitive damage awards in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). In *BMW*, the Court identified three "guideposts" to consider in evaluating the excessiveness under the Due Process Clause of a punitive damage award rendered in a state court: "the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil [and criminal] penalties authorized or imposed in comparable cases." *Id.* at 574.

Although the Court in *BMW* was considering whether a state law punitive damages award entered in a state court violated the Due Process Clause, an issue not present here, the Court nevertheless did examine whether the award was "grossly excessive." That inquiry is similar to the one posed in this case. While none of the *BMW* "guideposts" are outcome-determinative, they may be helpful in determining whether a federal jury's award may survive; if a verdict would be unconstitutionally excessive if rendered in a state court, it is difficult to see how the verdict would be permissible simply because it was returned by a federal jury. Therefore, the jury's punitive damage award in this case will be examined in light of the guideposts set down in *BMW*.

In *BMW*, the Court instructed that "punitive damages may not be 'grossly out of proportion to the severity of the offense.' " *BMW*, 517 U.S. at 574 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991)). The Court suggested a hierarchy of reprehensibility, with acts of violence or threats of bodily harm being the most reprehensible, followed by acts taken in reckless disregard for others' health or safety, affirmative acts of trickery and deceit, and finally, acts of omission and mere negligence. Id. at 579. In addition, the Court indicated that conduct is more reprehensible, and thus

deserving of greater punishment, if the defendant "repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful." *Id.* at 576.

Here, evidence was presented that Wesley's actions were apparently taken in reckless disregard for others' rights. Under the "hierarchy of reprehensiveness" created by the Court in *BMW*, Wesley's conduct was clearly more reprehensible than the conduct in issue in *BMW* since the Court found that BMW made no deliberate false statements and committed no acts of affirmative misconduct. In *BMW*, the Court found that the conduct there gave rise only to "a modest award of exemplary damages" and did not "establish the high degree of culpability that warrants a substantial punitive damages award." *Id*. at 580. Thus, the reprehensibility of Wesley's conduct clearly warrants a substantial punitive damage award.

The second of the "guideposts" identified by the Supreme Court in *BMW* is the disparity between the actual or potential harm to the plaintiff and the punitive damages award. *BMW*, 517 U.S. at 580-81 ("The $2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of his actual harm as determined by the jury."). The Court stated that the proper inquiry is "'whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.'" *Id*. at 581 (quoting *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993)) (quoting in turn *Haslip*, 499 U.S. at 21). While the Court did not set down a presumptive ratio for punitive to compensatory damages, it did note that a punitive damage award of four times the amount of compensatory damages in another case was "close to the line" in terms of constitutional propriety. *Id*. at 581 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991)).

Here, while the jury awarded only nominal damages for Wesley's breach of its fiduciary duty to plaintiffs, evidence was presented that if Wesley's plan had succeeded

plaintiffs would have been required to pay Wesley on its claims against them, a sum totaling $3,902,775. Thus, the punitive damages awarded in this case amount to but a fraction of the harm likely to result from Wesley's conduct. Moreover, an award of actual damages "is not necessary to support an award of punitive damages." *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co.*, 510 N.W.2d 153, 156 (Iowa 1993) (citing *Pringle Tax Serv., Inc. v. Knoblauch*, 282 N.W.2d 151, 154 (Iowa 1979)). "The plaintiff need only show that the defendant actually caused plaintiff some injury to sustain a verdict for nominal compensatory damages (for example, one dollar) and punitive damages." *Hockenberg Equip. Co.*, 510 N.W.2d at 156. Thus, the amount of punitive damages awarded here is clearly not "beyond the line" in terms of constitutional propriety. Therefore, this portion of Wesley's motion is also denied.[2]

E. Motion For New Trial

Wesley has alternatively moved for a new trial pursuant to Federal Rule of Civil Procedure 59. Rule 59 states, in relevant part, as follows:

> (a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts in the United States ….

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[2]The Supreme Court also identified civil or criminal penalties that could be imposed for comparable conduct as the third indicium of excessiveness of punitive damage awards and directed courts to "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." *BMW*, 517 U.S. at 583 (quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)). The parties, however, have not directed the court to any federal civil or criminal penalties for the conduct in question in the instant case.

FED. R. CIV. P. 59(a). Regarding motions for new trial under Federal Rule of Civil Procedure 59, the Eighth Circuit Court of Appeals has observed:

> With respect to motions for new trial on the question of whether the verdict is against the weight of the evidence, we have stated: "In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence--it can 'weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain a verdict.'" *Ryan v. McDonough Power Equip.*, 734 F.2d 385, 387 (8th Cir. 1984) (citation omitted). Similar language appears in *Brown*, 755 F.2d at 671-73; *Slatton [v. Martin K. Eby Constr. Co.]*, 506 F.2d [505], 508 n.4 [(8th Cir. 1974), *cert. denied*, 421 U.S. 931, 95 S. Ct. 1657, 44 L. Ed.2d 88 (1975)]; *Bates [v. Hensley]*, 414 F.2d [1006], 1011 [(8th Cir. 1969)], and early authority cited in *Bates*. *See also Leichihman v. Pickwick Int'l*, 814 F.2d 1263, 1266 (8th Cir.), *cert. denied*, 484 U.S. 855, 108 S. Ct. 161, 98 L. Ed.2d 116 (1987). These cases establish the fundamental process or methodology to be applied by the district court in considering new trial motions and are in contrast to those procedures governing motions for j.n.o.v.

White v. Pence, 961 F.2d 776, 780 (8th Cir. 1992). Thus, the Eighth Circuit Court of Appeals concluded in *Pence* that the district court may grant a new trial on the basis that the verdict is against the weight of the evidence, if the first trial results in a miscarriage of justice. *Id.; see also Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1010 (8th Cir. 2000) (stating that a motion for new trial should only be granted if the jury's verdict was against the great weight of the evidence so a to constitute a miscarriage of justice) (citation omitted); *Shaffer v. Wilkes*, 65 F.3d 115, 117 (8th Cir. 1995) (citing *Pence*); *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 800 (8th Cir. 1994) (stating "[a] motion for new trial should be granted if, after weighing the evidence, a district court concludes that the jury's verdict amounts to a miscarriage of justice."); *Jacobs Mfg. Co. v. Sam Brown Co.*,

19 F.3d 1259, 1266 (8th Cir.) (observing that the correct standard for new trial is the conclusion that "the [jury's] verdict was against the 'great weight' of the evidence, so that granting a new trial would prevent a miscarriage of justice."), *cert. denied*, 513 U.S. 989 (1994).

In support of its alternative motion for new trial, Wesley reasserts the arguments raised in support of its motion for judgment as a matter of law. The court has concluded that these arguments did not support granting such a motion. Likewise, because the jury's verdict does not weigh against the 'great weight' of the evidence, the court concludes that the jury's verdict does not amount to a miscarriage of justice. Therefore, Wesley's motion for a new trial is also denied.

III. CONCLUSION

The court has considered each of the grounds raised in defendant Wesley's motion for judgment as a matter of law, and concludes that the motion must be denied. Likewise, the court has considered the grounds raised in defendant Wesley's alternative motion for new trial, and finds that this motion must also be denied.

IT IS SO ORDERED.

DATED this 10th day of May, 2002.

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MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA